PP

v.

KELVIN VOO YU FU

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DAVID WONG DAK WAH J
[CRIMINAL TRIAL NO: K45-04-2008]
17 JULY 2009

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in a dangerous drug - 368.79 grammes Methamphetamine - Use of double presumptions under s. 37(d) and (da) - Prosecution seeking to rely on presumption under s. 37(d) DDA 1952 to trigger presumption of trafficking under s. 37(da) DDA 1952 - Prohibition against double presumption - Whether offence of trafficking established*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in a dangerous drug - 368.79 grammes Methamphetamine - Mens rea possession - Defence that drugs belonged to third party and accused merely delivered bag containing drugs without knowledge of contents - Whether accused had actual knowledge of drugs - Conduct of accused upon arrest - Whether manner in which drugs were packed inferred knowledge of nature of drugs on accused - Most favorable inference to accused to be adopted - Failure to prove that accused had requisite knowledge - Prima facie case not proven*

One Leong Bui Jin ('PW9') had agreed to help the police to apprehend certain drug traffickers by arranging for the purchase of half kilo of syabu. PW9 then contacted a male Chinese person by the name of Mathew through telephone and agreed for the purchase of the syabu at a price of RM14,800. PW9 agreed to use his car as security in respect of the purchase price. Mathew then informed PW9 that he would come to collect the car and someone else would deliver the syabu. Matthew then came to collect the car and informed PW9 that someone would deliver the drugs to him later. Subsequently PW9 received a telephone call from a handphone belonging to the accused informing him that Mathew had asked him to deliver something to him. PW9 then told the accused to come to an agreed place. The accused arrived at the agreed place with a black sling bag which the accused handed over to PW9 before turning around to walk away. The accused was arrested by the police at this point and the black sling bag was found to contain 10 small clear plastic packets of clear substance wrapped in newspaper inside a black plastic bag. The clear substance found in

A the black sling bag, upon analysis by the government chemist was later confirmed to be methamphetamine. The accused together with one Mathew who was still at large were charged of an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) for trafficking in 368.79 grammes of Methamphetamine.

B **Held (acquitting and discharging the accused):**

(1) What the prosecution was seeking to do was to rely on the presumption provided for under s. 37(d) of the Act to trigger the presumption of trafficking under s. 37(da). This is what is C known as the "double presumption" approach which has been held to be bad in law by the Federal Court in *Muhammed bin Hassan v. PP.* (para 9)

(2) For the accused to be incriminated with trafficking of the dangerous drugs the requirement of knowledge on the part of D the accused must be satisfied. The accused must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Knowledge is an element of the state of mind of a person. To establish possession the element of knowledge must be judged from his E outward acts or omissions. There was no direct evidence of knowledge on the part of the accused, hence leaving the court to draw inference from all the facts and circumstances of the case. (para 17)

F **(3)** The manner in which the drugs were packed did not infer knowledge of the nature drugs on the accused. Where there has been a negotiated deal for the sale of the drugs by the agent provocateur and a third party supplier, knowledge of the nature of drugs cannot be inferred on the person delivering the drugs. Where there are two possible inferences from the circumstance G of the case, the most favorable inference to the accused must be adopted. (para 22)

(4) There was no evidence whatsoever to indicate that the accused had anything to do with the packing of black plastic bag and H the contents therein. Nor was there any evidence that he was told what he was carrying was methamphetamine. Further it was undisputed that the accused was not involved in the negotiation of the sale and purchase of the drugs. On the totality of evidence before the court, the prosecution had failed I to prove that the accused had the requisite knowledge to

sustain the charge. That being the case there could not have been a meeting of minds between the accused and Mathew for a prearranged plan to traffic in drugs. (paras 24 & 26)

(5) The prosecution had failed to make a *prima facie* case against the accused. (para 27)

Case(s) referred to:
Asdanusi Daut & Anor v. PP [2004] 3 CLJ 669 CA ***(refd)***
DPP v. Brooks [1974] 2 All ER 840 ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
PP v. Badrulsham Baharom [1987] 1 LNS 72 HC ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
PP v. Chung Chung Kiang & Ors [2008] 1 LNS 400 HC ***(refd)***
PP v. Lam San [1991] 3 CLJ 2410; [1991] 1 CLJ (Rep) 391 SC ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Ramanathan Chelliah [2009] 3 CLJ 300 CA ***(refd)***
PP v. Tan Tatt Eek & Other Appeals [2005] 1 CLJ 713 FC ***(refd)***
PP v. Tan Tatt Eek [2005] 4 CLJ 460 FC ***(refd)***
Toh Su Kuan v. PP [2005] 3 CLJ 740 CA ***(refd)***
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 FC ***(refd)***
Wjchai Onprom v. PP [2006] 3 CLJ 724 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 12(2), 37(d), (da), (da)(i), 39A(2)(d), 39B(1)(a)
Evidence Act 1950, s. 8

For the prosecution - Mohamed Zairi Zainal Abidin DPP (Eyu Ghim Siang DPP with him); AG's Chambers
For the accused - Sugumar Balakrishnan; M/s Sugumar & Co

Reported by Amutha Suppayah

JUDGMENT

David Wong Dak Wah J:

The Charge

[1] The charge against the accused reads as follows:

A That you together with one name Mathew who is still at large, on the 18.3.2008, at about 5.50pm, in front of lift entrance, ground floor parking lot, Block 2, Api-Api Centre, in the District of Kota Kinabalu, in the State of Sabah, in furtherance of common intention did traffic in a dangerous drug to wit 368.79 grammes of Methamphetamine and that you both have thereby committed an offence under Section B 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234) and punishable under Section 39B(2) of the same Act read together with Section 34 of the Penal Code.

[2] For defense to be called the prosecution is required to prove C the following ingredients:

a. That the accused on 18 March 2008 at about 5.50pm, in front of lift entrance, ground floor parking lot, Block 2, Api-Api Centre, in the District of Kota Kinabalu did traffic in a dangerous drug to wit 368.79 grammes of Methamphetamine; D and

b. That the accused's act was done together with a person by the name of Mathew, who is at large, in furtherance of common intention to traffic in a dangerous drug to wit 368.79 grammes of Methamphetamine.

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Standard of proof

[3] At the end of the prosecution case I am required to determine whether the prosecution has made out a *prima facie* case F against the accused. I had in the case of *PP v. Chung Chung Kiang & Ors* [2008] 1 LNS 400 come to the conclusion that the phrase '*prima facie* case' means 'beyond reasonable doubt'. My reasons for that view are fully set out in that judgment and I adopt those reasons here. It is of interest that in the recent case of *PP v. Ramanathan Chelliah* [2009] 3 CLJ 300 the Court of Appeal through G the judgment of Zainun Ali JCA had this to say:

> On the question of the standard of proof, our view is simply this. Though the majority decision in *Arulpragasan* held that the test at the close of the prosecution's case was beyond reasonable doubt which means a maximum evaluation of evidence should be undertaken by the H court, the decision in *Tan Boon Kean* went the other way. It stood for the "*prima facie* test".
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> However it must be noted that the Federal Court in *Tan Boon Kean* agreed with the principle established in *Khoo Hi Chiang* that the quantum of proof at the close of the prosecution's case is based on the I maximum evaluation of evidence.

The terminology may differ, but both the majority and minority were united on the point that the court must undertake a maximum evaluation of evidence at the close of the prosecution's case.

This observation is manifested in *Looi Kow Chai & Anor v. Public Prosecutor* [2003] 1 CLJ 734. And again in the Federal Court case of *Balachandran v. Public Prosecutor* [2005] 1 CLJ 85, the maximum evaluation test was applied. Augustine Paul FCJ speaking for the Federal Court held that at the close of the prosecution's case, the court must undertake a positive evaluation of the credibility and reliability of all evidence adduced by the prosecution.

In view of the above, the trial judge in this appeal had, in our view, applied the correct standard of proof in following the case of *Tan Boon Kean* (in her grounds of judgment). Even if she had referred and followed the standard determined by *Khoo Hi Chiang* based on the above analysis, the trial judge applied the same standard of proof, ie, maximum evaluation of the evidence since the difference between the standard of proof in both *Tan Boon Kean* and *Khoo Hi Chiang* is basically a difference in semantics. The importance lies in its quantum which in both, are the same.

Thus, in our view the trial judge in applying the correct standard of proof at the end of the prosecution's case had not misdirected herself.

Prosecution case

[4] On 18 March 2008 Inspector Sundar (who is the Investigating Officer and PW5), after receiving a tip off, organized a party of six officers including himself to assemble at Block 2, Api Api Center, Kota Kinabalu, where they managed to arrest one Leong Bui Jin (PW9). The police had found some drugs in his car parked at the basement car park. PW9 then requested Inspector Sundar to release him and in return he will help the police to make some arrangements to get some drugs. Inspector Sundar agreed to the request and asked PW9 to arrange for the purchase of half kilo of syabu. PW9 then contacted a male Chinese person by the name of Mathew through a telephone number 017 8208040 to purchase a half kilo of syabu. After several phone calls, PW9 was told by Mathew that the price for the syabu would be RM14,800 and PW9 had to use his car as security in respect of the purchase price to which PW9 agreed. Mathew then informed PW9 that he would come to collect the car and someone else would deliver the syabu. Matthew upon arrival at the basement car park at Block 2, Api-api center telephoned PW9 that he had arrived. Inspector Sundar then instructed PW9's girlfriend (who was accompanied by a woman police officer - PW7) to hand over the car keys to Mathew which

she did. PW7 saw a male person with fair skin, short hair, plump, and about 170 cm tall approach PW9's girlfriend who then handed over the keys. Not long after that Mathew telephoned PW9 complaining that there was not enough air pressure in his car's tyres and he also informed PW9 that someone would deliver the drugs to him later. Subsequently PW9 received a telephone call from handphone number 013-8566856 which belonged to the accused informing him that Mathew had asked him to deliver something to him and also asked him where he was. PW9 then told the accused to come to Block 2, Basement car park, Api Api Center. Inspector Sundar then instructed his officers to go down to the basement car park and prepare to arrest the accused upon the handing over of the drugs to PW9. At about 5.20pm PW9 received a telephone call from the accused that he had arrived at the basement car park of Api Api Center. Inspector Sundar, Detective Tsen Su Phin and PW9 then went down to the basement car park by using the lift to meet the accused. When they arrived at the basement, PW9 waved to the accused to come towards him to the glass door. The accused had on his shoulder a black sling bag (exh. P2 (a)) which the accused handed over to PW9 before turning around to walk away. Inspector Sundar then instructed his officers to arrest the accused and PW9. Upon the arrest, Inspector Sundar inspected the contents of the black sling bag in front of PW9 and the accused and found it to contain a black plastic bag and inside it another black plastic bag which contained 10 small clear plastic packets of clear substance suspected to be syabu wrapped in newspaper. The accused and PW9, together with the black sling bag, were later brought to Ibu Pejabat Polis Kontinjen Sabah Kepayan. Inspector Sundar then instructed his officers to search for Mathew but unfortunately they failed to find him.

[5] The clear substance found in the black sling bag, upon analysis by the government chemist was later confirmed to be methamphetamine, a dangerous drug listed under the first schedule of the Dangerous Drugs Act, weighing 368.79 grammes.

Contents In The Black Sling Bag Proven To Be Methamphetamine?

[6] In my opinion, the prosecution had successfully proven that the substance seized is methamphetamine weighing 368.79 grammes. In coming to my conclusion I applied the principle stated in the case of *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 and that is that the chemist's evidence is to be accepted at its face value unless it is inherently incredible.

Munusamy's rationale was adopted by the Supreme Court in *Public Prosecutor v. Lam San* [1991] 3 CLJ 2410; [1991] 1 CLJ (Rep) 391. This is what Hashim Yeop A Sani CJ (Malaya) said in that case:

> Two things are implicit in that passage. First, unless the evidence is so inherently incredible that no reasonable person can believe it to be true, it should be accepted as *prima facie* evidence. Secondly, so long as the evidence is credible, there is no necessity for the chemist to show in detail what he did in his laboratory.

[7] In my view the chemist's (PW3) evidence had been quite comprehensive in that he had explained to the court how he got the substance from the police and how he had conducted his test and came to his conclusion. Further despite extensive cross examination by counsel for the defense his evidence was never shaken.

Did The Accused Traffic In Drugs?

[8] From the outset of the trial, the DPP submitted as follows:

> It is our humble submission that the Accused was in actual possession of the drugs in question. Thus by virtue of having in possession 368.79 grammes of Methamphetamine, being an amount in excess of the amount triggering the presumption of trafficking, the court should call the accused to enter defence on this charge.

[9] Hence I agree with counsel for the defense that what the prosecution is seeking to do is to rely on the presumption provided for under s. 37(d) of the Act to trigger the presumption of trafficking under s. 37(da). This is what is known as the "double presumption" approach which of course has been held to be bad in law by the Federal Court in *Muhammed Hassan v. PP* [1998] 2 CLJ 170 where the apex court held that to activate the presumption under s. 37(da) "there must be an express affirmative finding as opposed to legal presumption as understood in criminal law, based on evidence". That principle is clearly explained by Gopal Sri Ram JCA (as he then was) in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 as follows:

> In his judgment, Mokhtar Sidin JCA, took the view that it offended the principle laid down in the decision in *Muhammed Hassan v. Public Prosecutor* [1998] 2 CLJ 170. That principle has come to be known as the rule against double presumptions or the rule against a presumption upon a presumption. The principle is simply this. The presumed possession under Section 37(d) of the Act is not the 'possession' referred to in Section 37(da) of the Act. The phrase 'found in

A possession' in Section 37(da) refers to actual possession. Hence, where the prosecution intends to rely on the presumption under Section 37(da), it is necessary for it to prove by positive evidence and not by the presumption under Section 37(d) all the ingredients of possession in law. If there is a failure to prove those ingredients, then the prosecution would fail to establish a case of trafficking through the B vehicle of s. 37(da).

[10] *Muhammed Bin Hassan*'s case has been revisited by the Federal Court twice and on both occasions they had refused to overrule it. (see *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381 and C *PP v. Tan Tatt Eek & Other Appeals* [2005] 1 CLJ 713.)

[11] What then is 'possession' under s. 37(da)? The answer lies in the following passage of Gopal Sri Ram JCA (as he then was) in *PP v. Mohd Radzi bin Abu Bakar (supra)*:

D Now, as to what the ingredients of possession in law is has been established by a long line of cases. We find it unnecessary to discuss all of them here. Suffice that we refer to two of them. In *Toh Ah Loh & Mak Thim v. Rex* [1948] 1 LNS 72. Gordon-Smith Ag CJ when delivering judgment of the Singapore Court of Appeal explained the meaning in law of the word 'possession' when appearing in a statute. E His Lordship said:

> Possession, in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed, must have in him a power of disposal over the thing, and lastly must be conscious of his possession of the F thing. If these factors are absent, his possession can raise no presumption of *mens rea*, without which (except by statute) possession cannot be criminal.
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> The second is *Saad Ibrahim v. Public Prosecutor* [1967] 1 LNS 154 where Yong J stressed the necessity of establishing the G ingredient of knowledge on the part of an accused before he could be incriminated with possession. His Lordship there said:
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> > In my opinion mere possession is one thing and possession with *mens rea* is another. Possession which incriminates must have certain characteristics. The possessor must be aware of H his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of *mens rea*. Without *mens rea* possession cannot be criminal except in certain cases created by statute, which is not applicable in this case.

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> We would also mention the learned judgment of Lim Beng Choon J in *Public Prosecutor v. Badrulsham bin Baharom* [1987] 1 LNS 72, which contains a full discussion of the several cases on the point.
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> We accept these authorities as correctly stating the law. It follows that where the prosecution seek to prove trafficking by relying on s. 37(da), it must prove at the trial, all the ingredients of possession set out in the case of *Toh Ah Loh* and *Mak Thim* and *Saad Ibrahim.*

[12] In *Public Prosecutor v. Badrulsham Baharom* [1987] 1 LNS 72, Lim Beng Choon J stated what possession means:

> ... I believe it is well settled at least by our Courts that to establish possession by an accused person of any dangerous drugs or to impute to him possession of the said drugs it must be first shown that he had knowledge of the drugs which were found to be in his possession. The earliest authority, which I could find, that expounded this principle is the case of *Chiah Tian v. Rex* where the then Chief Justice of Singapore said at p. 106:
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> > In my opinion, possession to be an offence must be possession under such circumstances that a court is justified in finding that the accused (or the servant in cases of constructive possession) was conscious of the possession. As Pollock C.B. put it in *The Queen v. Woodrow* 16 L.J. M.C. 122, 'a man can hardly be said to be in possession of anything without knowing it' and I think that a person is not guilty of the offence of possession if he is not aware of the possession.

Has The Prosecution Proved That The Accused Has Knowledge That The Contents In The Black Sling Bag Contained Methamphetamine?

[13] In deliberating on the issue I am left with circumstantial evidence as opposed to direct evidence in the form of a confession by the accused and I keep in mind what Edgar Joseph Jr SCJ said in *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 that was:

> It is trite law that where the prosecution is relying on circumstantial evidence, the onus upon it is a very heavy one and that evidence must point irresistibly to the guilt. If there are gaps in it, then that will not be sufficient.

A **Defense's Contention**

[14] Counsel for the defense in his submission had listed out the grounds which gave rise to the inference that the accused had no knowledge that what he was carrying contained methamphetamine and they are:

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1. The accused was only a carrier or mule of the methamphetamine, in that he was requested by one Mathew Loh Wun Sing to deliver the black sling bag to PW9.

C

2. The accused would not have known what was inside the black sling bag as the ten clear plastic bags containing clear crystal (P2(f) - (o)) were wrapped with two layers of newspaper which were again wrapped tightly with two black plastic bags. So by natural inference no one including the accused would know what was inside the black sling bag unless he had opened all the wrappers.

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3. There is no evidence that the accused had opened the wrappers as no finger prints of the accused were found on any of the exhibits. On this point counsel for the accused submitted that there is a conflict of evidence on whether fingerprint dusting on the accused had been done. Inspector Sundar had testified that this had been done while the officer in charge of finger dusting (PW8) testified that he had not done it. Be that as it may counsel for the accused emphasized that PW8 had not found any fingerprints on the exhibits which he submitted shows conclusively that the accused had not unwrapped the black sling bag and its contents.

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4. There was no evidence to show that the accused had been involved in negotiating the sale and purchase of methamphetamine as that negotiation took place between PW9 and Mathew only. Learned counsel referred to this part of cross-examination:

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> Q: In the phone conversation between you and Matthew in reference to the half kilo of ice ice baby, am I correct during the conversation that the only reference was to his boss, your Brunei party, price and mode of payment and how the payment is to be secured?
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> A: Yes
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> Q: The dealing was entirely between you, Matthew and his boss?
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> A: Yes

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Q: Put: that in this dealing between you Matthew and his boss there was absolutely no reference to the accused. Do you agree? A

A: Yes

Q: Put: that the accused was not at all involved in the dealing or transaction of the drugs during the conversation. Do you agree? B

A: Yes

5. There is no admissible confessional statement by the accused to indicate he had the necessary knowledge that the black sling bag contained methamphetamine. On this point counsel referred C to the evidence of Inspector Sundar which is as follows:

A: I disagree with a few parts. First the accused received call from PW9 before this and PW9 knew the accused very well because this is the fourth time that the accused sent drugs to PW9. Second when the accused waited for PW9 at block 2 lift Corporal D Tseu was with PW9 but he gave the bag straightway to PW9. Then PW9 said thank you and the accused left. After the arrest I did question accused who asked you to send the drugs, he said it was Matthew and I also asked what did you get from the delivery and he said he got RM500 commission for every delivery. And I also asked him how many times have you made such E delivery and he told me this was the fourth time.

Counsel for accused then submitted that this evidence should be held inadmissible as the alleged statement purportedly made by the accused was after his arrest without any caution having F been administered as required by law. Let me at this juncture say that I agree with the contention made and hence will not take into account what was said by the accused.

6. The outward acts of the accused from the time he arrived at the scene of the crime to the time of his arrest and subsequent G to his arrest showed that of an innocent person. The two aspects are (1) the accused had no hesitation to hand over the black sling bag to PW9 despite the fact that there were strangers present at the place of transaction which was not a secluded place and (2) the accused had made no attempt to H escape at the time of arrest. It was also submitted that Inspector Sundar's evidence that the accused was in shock when he was arrested should be rejected as he had testified that he did not see the accused being arrested.

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DPP's Contention

[15] In rebuttal the learned DPP submitted that as the accused was found carrying the black sling bag containing methamphetamine and handing it over to PW9, this act of carrying constitute direct evidence of trafficking and relied on the definition of s. 2 of the Act which reads as follows:

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> "trafficking" includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying, or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act;

C

[16] With respect the learned DPP's proposition is not correct in law. In *Wjchai Onprom v. PP* [2006] 3 CLJ 724, the Court of Appeal reaffirmed that possession as defined in ss. 2 and 37(da) of the Act is not mere physical possession but *mens rea* possession. This is what the court said:

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> Because of the way in which the case was tried and argued in the court below, we think it apposite to re-state the law on the subject of actual trafficking of drugs. In a case where the prosecution is relying on evidence of possession to prove actual trafficking by having resort to the definition in s. 2, such possession must be accompanied by some overt act on the part of the accused to be able to constitute trafficking. See, *Public Prosecutor v. Hairul Din bin Zainal Abidin* [2001] 6 CLJ 480; *Public Prosecutor v. Nik Ahmad Aman* [2002] 6 CLJ 369; *Mohamad Yazri bin Minhat v. Public Prosecutor* [2003] 2 CLJ 65. In other words, mere passive possession is insufficient to establish a case of actual trafficking.

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> Where the prosecution relies on possession accompanied by some overt act on the part of the accused as constituting the offence of trafficking, the court is concerned with two questions. First, whether the accused had *mens rea* possession of the prescribed drug. This is because the word 'possession' appearing in ss. 2 and 37(da) of the Act does not connote mere physical possession. Second, the purpose for which he had the prescribed drug in his possession. Although in most, if not all cases, the evidence presented to the court is common to both questions it is nevertheless important to address the two questions.

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Findings Of The Court

[17] To recap, for the accused to be incriminated with trafficking of the dangerous drugs the requirement of knowledge on the part of the accused must be satisfied. The accused must be aware of his possession, must know the nature of the thing possessed and must

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have the power of disposal over it. Knowledge is an element of the state of mind of a person. To establish possession the element of knowledge must be judged from his outward acts or omissions. As stated earlier in my judgment there is no direct evidence of knowledge on the part of the accused, hence leaving the court to draw inference from all the facts and circumstances of this case, giving due weight to the credibility of the witnesses. I also seek guidance from decided cases such as the case of *Asdanusi Daut & Anor v. PP* [2004] 3 CLJ 669 where the facts were these. The two appellants were charged and convicted for trafficking in a dangerous drug (2,411.9g of cannabis) under s. 39B of the Dangerous Drugs Act 1952 and were sentenced to death. At the trial, evidence was led to show that the 2nd accused had telephoned the agent provocateur with an offer to sell the latter some drugs. Both the accused then proceeded on a motorcycle (with the 1st accused riding pillion) to meet up with agent provocateur at the pre-arranged location. Upon their arrival thereat, the 1st accused, at the request of the 2nd accused, handed a bag containing the dangerous drug to agent provocateur. They were then arrested by the police. The Court of Appeal in reversing the decision of the trial judge said:

> On the present facts, the prosecution had to establish that the first appellant had knowledge that the bag contained the prescribed drug. We have already recited the most telling facts against the first appellant. In our view his mere presence at the scene and his obedience to the second appellant's request to hand the bag to PW3 admits of several inferences, including the inference that the first appellant was unaware of the bag's contents. As the inference most favorable to the accused must be drawn, it is clear that an essential element of the offence charged had gone unproved.
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> We were reminded more than once by the learned deputy that this is a case in which the prosecution was seeking to establish trafficking by direct evidence without resort to any statutory presumption. More so then must the prosecution prove a prearranged plan to traffic in the drug in question. For there to be a pre-arranged plan, it must be shown that the first appellant knew about the contents of the bag. And as we have already said, there are simply no material from which such knowledge could be inferred.
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> As Kitto J said in *Jones v. Dunkel* [1958-1959] 101 CLR 298, at p. 305:

> One does not pass from the realm of conjecture into the realm of inference until some fact is found which positively suggests, that is to say provides a reason, special to the particular case under consideration, for thinking it likely that in that actual case a specific event happened or a specific state of affairs existed. Needless to say, the facts here confine the court to the realm of conjecture on the issue of the existence of a pre-arranged plan. Based on the facts established by the prosecution, we simply had no choice but to find for the first appellant. The conviction entered against him was therefore quashed and he was acquitted and discharged of the offence with which he was charged.

[18] Another relevant case is *Toh Su Kuan v. PP* [2005] 3 CLJ 740 where the facts were these. The accused was arrested at a bus station and escorted to a police station, whereupon, he was searched and 356 small packets were found inside his shoes, strapped to his shins and tied to his waist. At the trial, the prosecution sought to establish 'trafficking' under s. 37(da)(i) DDA by way of direct and/or circumstantial evidence of 'possession'. The statutory presumption of possession under s. 37(d) DDA was not relied upon. The learned trial judge found that there was trafficking relying on the manner the drugs were found on the accused. The Court of Appeal disagreed in the following manner:

> The learned judge then proceeded to draw together what he considered to be the threads of circumstantial evidence. He expressed the view that the manner in which the packets were concealed pointed to the appellant having knowledge that the packets contained heroin. In this we find a parallel in the learned judge's method of induction as that adopted by Mohd Hishamuddin J in *Public Prosecutor v. Msimanga Lesaly & Anor* [2000] 5 CLJ 261 where the learned judge says as follows:
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> > I am satisfied that there is *prima facie* evidence that the first accused was found to be in possession of the heroin found in the slippers and on her body. The cunning manner in which the packages of heroin were concealed in her slippers and underneath her dress and tights indicates that she had knowledge of the heroin. Thus the presumption under section 37(da)(i) applies.
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> With respect, we are unable to agree with the line of reasoning expressed by the learned judge.
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> In our judgment, the manner in which the packets were fastened to the appellant's person shows at the highest that he had knowledge the packets contained some prohibited substance, perhaps, drugs or perhaps some other substance which was unlawful to have in one's possession. But it certainly does not prove that the appellant knew that the packets

> contained heroin, the drug which forms the subject matter of the charge. It follows from what we have said thus far that from the totality of the evidence led by the prosecution that the vital ingredient of *mens rea* possession required by s. 37(da)(i) had not been established. On that ground alone the learned judge ought not to have called the appellant to enter upon his defence. And this is a case where the learned deputy took the position that this was either a case of actual trafficking or no offence.

[19] The next case is that of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 where the facts were these. Several Customs personnel attempted to stop a motorcyclist. The motorcyclist then made a "U turn" and the pillion rider of the motorcycle leapt from the motorcycle and began to run away. After a short pursuit, both the rider (the respondent) and the pillion rider were apprehended. Four packages were recovered from the respondent. They were found to contain a substance, which on subsequent examination by the chemist, was found to be 342.1 grams of cannabis. The respondent was later charged with an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952, convicted and sentenced to death. On appeal the Court of Appeal had this to say:

> First, the evidence that is relied on by the learned deputy is less than confidence inspiring. The two main pieces of evidence relied on by him are the flight of the respondent from the scene and the finding of the four wrapped packages on his person. But, as pointed out by the learned President of the Court of Appeal (now Chief Justice) to the learned deputy during the course of argument, both these circumstances, even when taken together, do not go to prove trafficking. As to flight, it must be borne in mind this is not by itself proof of a guilty mind. The point has been made more than once and we find it sufficient to quote the following passage in the judgment of Edgar Joseph Jr. SCJ in *Abdullah Zawawi bin Yusoff v. Public Prosecutor* [1993] 4 CLJ 1:
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> > An innocent man faced with the prospect of arrest on a capital charge might foolishly react in that way. It is true that the appellant himself denied running away but we agree with the judge that the appellant lied on this point, but this does not preclude us from drawing such inferences as may be justified from the evidence adduced by the prosecution. The Jamaican Privy Council case of *DPP v. Brooks* [1974] 2 All ER 840, cited to us by the learned deputy public prosecutor, where the accused, who occupied the driver's seat of a stationary van which contained more than 1000 lbs of ganja, together with several others in the van, scrambled out and ran off, when police officers hurried towards the van, is, therefore, readily distinguishable.

> When the recovery of the packages is taken together with the evidence of flight, two inferences are reasonably possible. Either the respondent knew that the packages contained cannabis in excess of the statutory minimum or he thought that they contained some other contraband goods. In those circumstances, the established principle is that the inference most favourable to the respondent must be drawn. In other words, the prosecution had failed to prove beyond a reasonable doubt that the respondent knew the nature of the thing possessed which is a vital element of the ingredient of possession in the presumption under s. 37(da). This point was squarely put by the learned Chief Justice to the learned deputy during argument but no response was forthcoming.

[20] The last case which I wish to refer to is *PP v. Tan Tatt Eek* [2005] 4 CLJ 460 where the accused was charged with trafficking in dangerous drugs (74.9 grams of a mixture of heroin and monoacetylmorphines), and was found guilty as charged and sentenced to death. On appeal against the conviction and sentence, the Court of Appeal allowed the appeal and reduced the charge to one of possession under s. 12(2) punishable under s. 39A(2)(d) of the Act, and substituted the sentence to 15 years imprisonment together with a minimum whipping of 10 strokes. The Public Prosecutor appealed to Federal Court. The facts of the case showed that the accused was carrying an orange plastic bag in his right hand when he alighted from his car and entered a lift. The accused reappeared after five minutes later carrying the same orange plastic bag and proceeded to his car. An ambush was laid and as the accused was about to open the door of the car, the police approached and arrested him while he was in possession of a plastic bag, which upon examination, revealed two packages wrapped in newspaper and inside it were two clear plastic wrappings of substance which were later confirmed to be dangerous drugs. The learned trial judge found that the respondent had knowledge of the drugs by way of inferences and from the circumstances of the case. On appeal, the Court of Appeal reduced the charge to one of possession under s. 12(2) of the Act and the respondent was sentenced accordingly. In delivering the judgment of the court, KC Vohrah JCA said:

> Here there was no factual matrix on which the trial Judge could have inferred that the Accused had knowledge of the nature of the dangerous drugs. All that was proved was that he had control and custody of the bag and the packages of the impure drugs and under s. 37(d) the presumption could have been invoked for knowledge of the nature of the drugs. And bearing in mind the Federal Court case of *Muhammed bin Hassan v. PP* [1998] 2 MLJ 273 the prosecution cannot and in this case the trial Judge could not have relied on the

presumption under 37(d) to presume that the Accused was trafficking in the dangerous drugs under s. 37(da)(iiia). At the close of the prosecution case the learned trial Judge had relied on actual custody and control of the drugs in the Accused and his knowledge of the nature of the dangerous drugs without resort to the presumption of s. 37(d) for possession of the drugs in the Accused. And we have said there was no factual matrix for him to make the inference of such knowledge. He then invoked the presumption under s. 37(da) on the basis of proved possession and we say that no knowledge in the drugs having been proved there was no possession proved and the invoking of the presumption under s. 37(da) was misconceived. The learned trial Judge could only have called upon the Accused to rebut the presumption of possession under s. 37(d). The Accused made a unsworn statement that he was returning the bag to one "Ah Seng" who had left the bag in his car during a night out the previous day. Ah Seng had telephoned him to bring the bag to his apartment. He went to the 6th floor using the lift and did not find anyone there and he had returned to the car to use his mobile telephone to give Ah Seng a call when he was arrested. We had no hesitation on the evidence in the case and his defence to come to the conclusion that he had not rebutted on a balance of probabilities that he had possession of the dangerous drugs as charged. We set aside the conviction on the trafficking charge and substituted a conviction on a charge of possession of the dangerous drugs under s. 12(2) of the Act punishable under s. 39A(1)(d) of the Act and sentenced him to 15 years of imprisonment from the date of arrest and 10 strokes of the rattan.

[21] Not satisfied with the decision of the Court of Appeal, the prosecution appealed to the Federal Court where the only issue was whether on the facts the respondent had knowledge of the drugs in the plastic bag. This is what the Federal Court said:

In our view, the Court of Appeal was right in holding that there was no factual matrix adduced by the prosecution to infer that the respondent had knowledge of the nature of the drugs in the bag. On the evidence, the learned trial judge erred in finding that the respondent had knowledge of the drugs by way of inferences and from the circumstances of the case.

In this case, the respondent was seen and found to be carrying the orange plastic bag in his right hand and having dropped the bag he reacted with shock when he was arrested by the police. The learned trial judge held that the respondent had physical custody and control of the bag, and we see that he was right in coming to that conclusion. However, he went further to find by inference from the respondent's conduct and appearance that the respondent had knowledge of the drugs in the bag. To our minds, such a finding was not justified on the evidence before him.

A The factum of the respondent having dropped the bag and displayed reaction of shock can be facts upon which the prosecution can invite the trial court to infer guilt on the part of the respondent over the presence of the drugs in the bag. But such conduct is equally consistent with an innocent man who is in a state of pure panic reacts in that way (see *Abdullah Zawawi bin Yusoff v. Public Prosecutor* [1993] B 4 CLJ 1). On the conduct of the respondent, the learned trial judge at p. 133 of the appeal record jilid II had this to say:

> The accused was clearly caught by surprise. To my mind the reaction of shock and the dropping of the bag exhibited by a person caught by surprise does not unequivocally show guilt. It C could equally be the reaction of an innocent but surprised person. No firm inference can be drawn on the basis of such insufficient evident.

So, how much support do the facts of dropping and being in a state of shock lend the appellant in his submission that the court should infer D from them the fact that the respondent had knowledge of the drugs? In *Tai Chai Keh v. Public Prosecutor* [1948-49] MLJ Supp 105 at p. 108 Spenser Wilkinson J said:

> … where there is more than one inference which can reasonably be drawn from a set of facts in a criminal case, we are of E opinion that the inference most favourable to the accused should be adopted.

Thus, it is clear from the above said passage that what is required is that in order for the prosecution to ask the court to draw any inference, it must provide the court with clear evidence of a set of facts F which leave no other possible alternative inference which can reasonably be drawn. In the absence of such evidence, the court cannot but hold that there are other inferences possible in the circumstances. Hence, the facts of 'dropping and being in a state of shock' without more cannot constitute knowledge of the contents of the bag. There is simply insufficient evidence to support the inference of knowledge in the G present case. Furthermore, the evidence was that the drugs were in newspaper wrapped packages, and surely, one would not be able to see through the newspaper wrapping. One wonders how the manner of packaging in this case would in the ordinary course of conduct mean that the carrier knows of the contents of the bag. It is rather unfortunate that the learned trial judge indulged in conjecture and H speculation to make inferences of knowledge in this case.

[22] From the above cases the following guidelines can be distilled:

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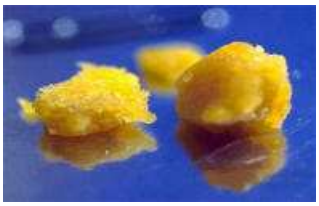
1. The manner in which the drugs are packed does not infer knowledge of the nature of drugs on the accused.

2. The manner on which the drugs are concealed on the body of the accused does not infer knowledge of the nature of drugs on the accused.

3. Where there has been a negotiated deal for the sale of the drugs by the agent provocateur and a third party supplier, knowledge of the nature of drugs cannot be inferred on the person delivering the drugs.

4. Where there are two possible inferences from the circumstances of the case, the most favorable inference to the accused must be adopted.

[23] I shall now apply those guidelines to the factual matrix in this case. The drug in question is methamphetamine which may be found in Rock form, Ice/Crystal and Powder form (see http://www.mjpolice.ca/meth.htm) as illustrated in photographs set out below:



[24] Unless the accused was the person who packed the drugs in question in the ten clear plastic packages or is a habitual drug dealer or user he would not know that the crystals in this case are methamphetamine. In this case the chemist had to carry out rigorous tests before he came to the conclusion that the crystal

found was in fact methamphetamine. Of course in this case, there is no evidence whatsoever to indicate that the accused had anything to do with the packing of the black plastic bag and the contents therein. In fact the absence of his finger print points conclusively that he took no part in the packing. Nor is there any evidence that he was told what he was carrying was methamphetamine. Further it is undisputed that the accused was not involved in the negotiation of the sale and purchase of the drugs. Other evidences which gave rise to inference of no knowledge on the part of the accused are:

1. The accused appeared normal during the transaction and had no hesitation in handing over the black sling bag to PW9 despite the presence of strangers at the glass door in the basement car park at Api Api Center.

2. The transaction occurred in a place which is accessible to the public.

3. The accused did not go there to collect the consideration for the sale of the drugs. That person is Mathew but unfortunately despite his presence at the location of the transaction was not caught by the police.

4. The accused made no attempt to flee at the time of arrest. The conduct of the accused is the relevant factor in considering whether he had knowledge of the contents in the black sling bag. Such conduct of course is admissible under s. 8 of the Evidence Act (see *PP v. Chia Leong Foo* [2000] 4 CLJ 649). In *DPP v. Brooks* [1974] 2 All ER 840, Lord Diplock had this to say on the conduct of fleeing at the time of arrest:

> On the evidence, including his own statement to the police, the 19 sacks of ganja were clearly in the physical custody of the Respondent and under his personal control. The only remaining issue was whether the inference should be drawn that the Respondent knew that his load consisted of ganja. On all the evidence and in particular the fact that he and the other occupants of the van attempted to run away as soon as they saw the uniformed police approaching, the magistrate was, in their Lordships' view, fully entitled to draw the inference that the Respondent knew what he has carrying in the van.

[25] Conversely in this case the fact that the accused did not attempt to flee and plus the fact that he had handed over the black sling bag without hesitation in a public place, in my view, gives rise to an inference that the accused had no knowledge of the methamphetamine contained in the black sling bag.

[26] Thus on the totality of evidence before the court and applying the decisions/principles of the above cited cases, I find that the prosecution had failed to prove that the accused has the requisite knowledge to sustain the charge. That being the case there could not have been a meeting of minds between the accused and Mathew for a prearranged plan to traffic in drugs.

[27] Accordingly I am of the opinion that the evidence are such that I am not prepared to convict the accused as charged if he had remained silent should defense be called. In other words the prosecution had failed to make a *prima facie* case against the accused as required by law.

[28] As such, the accused is acquitted and discharged.